

**Objections to the Modified Remediation Work Plan Approval, VRP No. 6991004,
Former Allison Plant 10, 700 North Olin, Indianapolis, Marion County, Indiana,
2005 OEA 70 (05-S-J-3527)**

[2005 OEA 70, page 70 begins]

TOPICS:

Voluntary Remediation Program
VRP
Remediation Work Plan
RWP
Person
Applicant
statutory construction
administrative action
IC 13-25-5-18
off site contamination
summary judgment

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner:	Daniel McInerny, Esq.
Permittee/Respondent:	Madonna McGrath, Esq.
IDEM:	Janice Lengel, Esq.

ORDER ISSUED:

December 2, 2005

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

[2005 OEA 70, page 71 begins]

STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	
IN THE MATTER OF:)	
)	
OBJECTIONS TO THE MODIFIED)	
REMEDICATION WORK PLAN)	
APPROVAL, VRP NO. 6991004,)	
FORMER ALLISON)	
PLANT 10, 700 NORTH OLIN)	

INDIANAPOLIS, MARION COUNTY,)	
INDIANA)	
)	CAUSE NO. 05-S-J-3527
Aimco Michigan Meadows Holdings LLC)	
Petitioner)	
)	
Genuine Parts Company)	
Respondent)	
)	
Indiana Department of Environmental)	
Management)	
Respondent)	

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER**

This matter having come before the Court on the Motion for Summary Judgment filed by Genuine Parts Company (the “Respondent”) which pleadings are part of the Court’s record; and the Environmental Law Judge (“ELJ”), having read and considered the petitions, motions, evidence, and the briefs and responses of the parties, finds that judgment may be made upon the record; and the ELJ, being duly advised, makes the following findings of fact and conclusions of law and enters the following Order:

FINDINGS OF FACT

1. Between 1956 and 1973, BHT Corporation (“BHT”) operated a facility for carburetor and brake re-manufacturing at 700 North Olin Avenue, Indianapolis, Indiana (the “Site”).
2. General Motors Corporation (“GM”) purchased the Site from BHT in 1973 and used the facility for warehousing. The facility became part of the General Motors Corporation Allison Gas Turbine Division.
3. After BHT sold the site to GM, BHT, through merger and acquisition, became part of Genuine Parts Company.
4. In 1993, GM sold the property to Allison Engine Company.

[2005 OEA 70, page 72 begins]

5. The Site was purchased in 2002 by 700 N. Olin Avenue, LLC, which currently uses the Site for warehousing.
6. Although the Respondent has never owned the property, through its relationship with BHT, the Respondent took responsibility for remediating the Site’s contamination.
7. On October 18, 1999, the Respondent submitted its application to the Indiana Department of Environmental Management’s Voluntary Remediation Program (the “VRP”). On November 9, 1999, the IDEM approved the application and on January 11, 2000, the Respondent and the IDEM entered into a VRP agreement.
8. 700 N. Olin Avenue, LLC was granted co-applicant status on October 10, 2003.

9. Pursuant to the VRP agreement, the Respondent submitted a Remediation Work Plan (the “RWP”) to the IDEM for review. The RWP was submitted in a timely manner.
10. Aimco Michigan Meadows Holdings LLC (the “Petitioner”) owns the Michigan Meadows Apartments located immediately south of the Site and the Michigan Plaza property located south of the Apartments property. The Petitioner submitted comments on the RWP during the public comment period.
11. The IDEM approved the RWP on March 22, 2005. The Petitioner filed its Petition for Administrative Review and Adjudicatory Hearing on April 7, 2005.
12. The Respondent filed its Motion for Summary Judgment on October 7, 2005. The Petitioner filed its Response to the Motion for Summary Judgment on November 7, 2005. The Respondent filed its reply on November 23, 2005.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.
2. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). “*De novo* review” means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

[2005 OEA 70, page 73 begins]

3. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind.Ct.App. 2000).
4. The statute at issue in this cause is the Voluntary Remediation of Hazardous Substances and Petroleum statute found at IC 13-25-5. There is no case law that interprets any portion of this chapter. “The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used.” *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004).
5. The rules of statutory construction also state, “If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience.” *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003).

6. Additionally, statutes must be read as a whole. “We ‘presume that the legislature did not enact a useless provision’ and that ‘where statutory provisions are in conflict, no part of a statute should be rendered meaningless but should be reconciled’ with the whole.” *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003) (citing *Moons v. Keith*, 758 N.E.2d 960, 965 (Ind. Ct. App. 2001)).
7. The Respondent argues that IC 13-25-5-18(e) prohibits any person from bringing an administrative action against the applicant to the VRP if that applicant has signed a VRP agreement with the IDEM. IC 13-25-5-18(e) states:

After an applicant and the department have signed a voluntary remediation agreement, a person may not bring an action, including an administrative action, against the applicant or any other person proceeding under this chapter on behalf of the applicant for any cause of action arising under this title or rules adopted under this title and relating to the release or threatened release of a hazardous substance or petroleum that is the subject of the agreement. However, this section does not apply if:

- (1) the applicant fails to file a proposed voluntary remediation work plan within the time period established in section 8(a)(8) of this chapter;
- (2) the commissioner rejects a proposed voluntary remediation work plan submitted in good faith and the rejection is upheld in any appeal brought under section 12 of this chapter;
- (3) the applicant or another person proceeding under this chapter on behalf of the applicant fails to complete a voluntary remediation in accordance with an approved voluntary remediation work plan; or

[2005 OEA 70, page 74 begins]

- (4) the commissioner withdraws the commissioner's approval of the voluntary remediation work plan and the withdrawal is upheld in any appeal under section 19 of this chapter.

However, if the commissioner withdraws approval of the plan under section 19(a)(2) of this chapter, the commissioner may bring an action, including an administrative action, against the applicant.

8. The Respondent is the applicant to the VRP in this matter.
9. “Person” is defined in IC 13-11-2-158(a) as:

"Person", for purposes of:

- (1) IC 13-21;
- (2) air pollution control laws;
- (3) water pollution control laws; and
- (4) environmental management laws, except as provided in subsections (c), (d), (e), and (h);

means an individual, a partnership, a copartnership, a firm, a company, a corporation, an association, a joint stock company, a trust, an estate, a municipal corporation, a city, a school city, a town, a school town, a school district, a school corporation, a county, any consolidated unit of government, political subdivision, state agency, a contractor, or any other legal entity.

10. The Petitioner meets the definition of “person” as used in IC 13-25-5-18(3).

11. The clear and unambiguous language of the statute states that no “person” may bring an administrative action against a participant in the VRP. The Respondent has signed a VRP agreement with the IDEM and is an active participant. The Respondent has presented evidence that none of the four conditions listed under IC 13-25-5-28(e) apply. The Petitioner did not present any evidence to refute this.
12. The Petitioner argues that it has not brought an administrative action against the Respondent, but against the IDEM. Under IC 4-21.5-3 and 4-21.5-7, technically, all administrative actions are brought against the IDEM. However, the end result is that the Respondent may be required to take some ^[1] action adverse to its interests; therefore, the Respondent is a party to the action and, certainly, has, at least, an equal stake in the outcome as the IDEM.
13. If the ELJ were to adopt the Petitioner’s interpretation, as the Respondent points out, it would lead to the absurd result that, even if the Petitioner prevails in its claim and the IDEM revises the RWP, the Respondent can simply decline to implement the revised RWP. IC 13-25-5-14.
14. The Petitioner is not without recourse if it disagrees with the RWP approved by the IDEM. ^[2] The ^[3] Petitioner has other options for redressing its perceived complaints.

[2005 OEA 70, page 75 begins]

15. The Petitioner argues that the legislature could not have intended to protect responsible parties from remediating offsite contamination. However, as stated above, injured parties have other recourse besides administrative actions to protect their interests. In addition, the IDEM itself has the authority to withdraw from the VRP agreement and force a responsible party to clean up contamination if it finds that the applicant has failed to comply with an approved RWP or that the contamination presents an imminent and substantial threat to human health and the environment. IC 13-25-5-19. The ELJ concludes that the legislature intended to provide this protection in order to “encourage the voluntary remediation of hazardous substances and petroleum.” IC 13-25-5-1(a).
16. Therefore, the ELJ concludes that there is no genuine issue as to any material fact and that IC 13-25-5-18 prohibits the Petitioner from bringing this action against the Respondent. As this resolves the matter, the Respondent’s other arguments do not need to be addressed.

ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Respondent’s Motion for Summary Judgment is **GRANTED**.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED THIS 2nd day of December, 2005.

Catherine Gibbs
Environmental Law Judge

[2005 OEA 70: end of opinion]

[1]

As the designation “Respondent” implies.

[2]

The ELJ understands that the RWP requires institutional controls. This would seem to give the Petitioner some input into the final remedial action. However, even if the ELJ is incorrect, the Petitioner should have other avenues available to redress its complaints.

[3]

The Petitioner has filed a complaint against the Respondent in the United States District Court, Southern District of Indiana, Indianapolis Division.

[2005 OEA 70: end of opinion]

[2005 OEA 70](#) in Microsoft Word format

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